SOH MAN TONG

v.

LAW SOO FIENG

HIGH COURT MALAYA, JOHOR BAHRU
ZAINUN ALI J
[CIVIL SUIT NO: 22-14 OF 1998]
27 APRIL 1999

CIVIL PROCEDURE: *Execution - Stay - "Special circumstances" - Application pursuant to O. 47 r. 1(a) Rules of the High Court 1980 - Whether "special circumstances" must be shown - See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd - Whether affidavit demonstrating "special circumstances" necessary - Monetary judgment - Opposing party can comply with order on appeal even if appeal successful - Whether militates against granting stay*

CIVIL PROCEDURE: *Execution - Stay - Oral application immediately after order pronounced - Whether affidavit demonstrating "special circumstances" necessary*

CONTRACT: *Time - Completion date - Whether same as date of settlement of purchase price - Whether date of completion stated in agreement remains same regardless of when full purchase price paid - Full purchase price paid by crossed cheque dated on a Saturday - Whether cheque can be cleared on that day - Whether agreement failed to be completed on time*

LEGAL PROFESSION: *Duty of care - Duty to opposite party - Date of completion of agreement falls on solicitor's day off - Opposite party ready, willing and able to complete agreement - Whether solicitor duty bound to complete agreement*

This was the defendant's appeal against the deputy registrar's order granting summary judgment to the plaintiff. A sale and purchase agreement was entered into between the parties and the plaintiff duly paid a 10% deposit, the relevant stamp duty charges and a certain sum to redeem a charge entered against the property in question so as to facilitate the sale transaction. As the balance purchase price according to the agreement was to be paid by 30 November 1997, the plaintiff, on 27 November 1997, handed over a crossed cheque dated 29 November 1997 to the defendant. The defendant, contending that the cheque will not be cleared on 29 November 1997 since it was a Saturday, responded on the same day by requesting a cashier's order instead of a cheque. However, payment by cheque was expressly allowed for by the terms of the sale and purchase agreement and further, the written request by the defendant for the

balance purchase price stated that a cheque would be acceptable. On 29 November 1997, the plaintiff's solicitor wrote to the defendant's solicitors requesting the relevant documents to be sent to them since the plaintiff had complied with the terms of the sale and purchase agreement. However, the defendant's solicitors could not accept service of this letter on 29 November 1997 because their firm does not work on Saturdays. Subsequently, by a letter dated 1 December 1997, the defendant informed the plaintiff that the sale and purchase agreement was terminated, that the 10% deposit would be forfeited and an undertaking was given to the effect that the redemption sum would be returned to the plaintiff. Neither the redemption sum nor the cheque for the balance of the purchase price was returned to the plaintiff.

As the court dismissed the defendant's appeal, the defendant's solicitors immediately applied orally for a stay of execution pending the defendant's appeal to the Court of Appeal. The defendant contended that as a result of a private caveat lodged by the plaintiff, any attempt on the part of the defendant to dispose the property would be thwarted. It was submitted that even if this did not amount to special circumstances, it did not matter since following the case of *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd,* special circumstances need not be shown.

Held:

[1a] The failure to accept service of the plaintiff's letter on 29 November 1997 because the defendant's solicitors' firm is closed on Saturdays combined with the refusal to accept the cheque dated 29 November 1997 is surely indicative of one thing and one thing only, that being, the defendant's disinclination to accept the plaintiff's cheque was simply because the defendant's solicitors' firm does not operate on Saturdays.

[1b] Regardless of whether it is a working day or not for the defendant's solicitors' firm, the defendant's solicitors is duty bound to see the agreement through especially since the preconditions have all been met with by the plaintiff. Thus, it is irrelevant whether the defendant's solicitors' firm is open on Saturdays or not since the banks are.

[2] It is commonplace for cheques to be presented to the bank and "marked" to ensure that they are cleared on the stated day. This is normal banking practice for commercial expedience and this can be done even if the cheque is from another local bank. Therefore, the defendant, having received the plaintiff's cheque on 27 November 1997, had three clear days to make the necessary banking arrangement. This was not done. Had the defendant done so, the payment of the balance would have been completed on 29 November 1997. Even if the cheque could not be

cleared on 29 November 1997, the worst that could have happened is that the plaintiff would be liable to pay any banking commission incurred and the day of clearance of the cheque would be considered the date of settlement of the balance purchase price.

[3] For all intents and purposes, the date of completion will always be 30 November 1997 as per the sale and purchase agreement. Whether the cheque is cleared before or after 30 November 1997 is irrelevant for purposes of the completion date since the completion date is not synonymous with the date of settlement.

[4] *See Teow Guan* proposes the nugatory approach in lieu of "special circumstances" and further, the defendant's application for stay is under O. 47 r. 1(a) of the Rules of the High Court 1980 where it is stated that there must be "special circumstances which render it inexpedient to enforce the judgment or order." The existence of a private caveat does not come within the sphere of "special circumstances".

[5a] Being an oral application, there was no affidavit citing "special circumstances" to justify the making of an order for stay of execution and thus the onus was on the defendant to demonstrate "special circumstances".

[5b] There has to be good reason for depriving the successful party of the fruits of its judgment at first instance. In this case there is no material before the court which shows some "special circumstances". Cases have repeatedly stated that an affidavit of "special circumstances" is necessary and this must be taken into consideration and viewed against the prejudice that might visit the plaintiff should the stay be granted.

[5c] In the light of the findings - (i) that there was no supporting affidavit thereby depriving the court of any material upon which it could exercise its discretion judiciously; (ii) that the defendant had no arguable case resulting in the grant of the O. 14 application; (iii) that the defendant had shown careless disregard to its own undertaking to reimburse the redemption sum due to the plaintiff; and (iv) that even if the defendant has merits in her appeal, as this was a monetary judgment the plaintiff will be able to comply with the order on appeal - it would be unjust and inequitable to have judgment stayed until final disposal of the appeal by the defendant.

[Appeal and application for stay dismissed.]

Case(s) referred to:
Atkins v. The Great Western Railway Company 11 LR 400 ***(refd)***
Kerajaan Malaysia v. Dato' A Ghani Gilong [1995] 3 CLJ 169 ***(refd)***
Leong Poh Swee v. Ng Kat Chong [1966] 1 MLJ 1986 ***(refd)***
Lim Yoh v. Astana Strategi (M) Sdn Bhd & Anor [1998] 2 CLJ Supp 275 ***(refd)***
See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd [1997] 2 CLJ 299 ***(refd)***
Syarikat Berpakat v. Lim Kai Kok [1983] MLJ 406 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 73
Rules of the Court of Appeal 1994, r. 13
Rules of the High Court 1980, O. 14, O. 41 r. 5(1), O. 47 r. 1(a)

For the appellant - Syed Ahmad Sadik; M/s CS Tam & Co
For the respondent - Ibrahim Hashim; M/s Hassan Ibrahim & Co

Reported by S Dharmendran

JUDGMENT

Zainun Ali J:

This is an appeal by the defendant against the order of the timbalan pendaftar handed down on 1 March 1999, which allowed an O. 14 application by the plaintiff

In the normal course of commercial transaction, the plaintiff expressed intention to purchase a property known as No. 21, Jalan Abdul Samad, Bukit Kesenangan, 80100 Johor Bahru, (hereinafter known as "the said property"), from the defendant for the sum of RM1,730,000.

On 11 July 1997, the parties entered into a sale and purchase agreement whereby the plaintiff paid 10% (RM173,000) of the purchase by issuing his own cheque. Subsequently, the plaintiff then paid the stamp duty on transfer to the stamp duty office on 23 October 1997, amounting to RM45,000.

Before the parties entered into the sale and purchase agreement, the defendant had charged the said property to the Bank of Commerce. To facilitate the transaction, the defendant had to redeem the charge. The plaintiff issued his cheque in the amount of RM455,183 to redeem the said property. It is established that the said property was duly redeemed.

It is a term of the said sale and purchase agreement in the second schedule that the balance purchase price amounting to RM1,101,817 is to be settled on or before **30 November 1997.**

On 27 November 1997, the defendant's solicitor sent an urgent letter to the plaintiff demanding a cheque for the balance purchase price amounting to RM1,101,817 before 1pm on 27 November 1997. (exh. P5 in encl. 33).

The plaintiff responded on the same day, 27 November 1997, enclosing a cheque postdated to 29 November 1997 for RM1,101,817 being the balance due (less the redemption sum). The plaintiff's letter was sent by hand. (exh. P4 in encl. 33).

The defendant responded on the same day by issuing a letter dated 27 November 1997; whilst acknowledging the receipt of plaintiff's cheque, the defendant demanded that a cashier's order be given instead of the cheque for the balance purchase price, on the ground that the post-dated cheque could not be cleared on 29 November 1997 since 29 November 1997 falls on a Saturday (exh. P1 in encl. 19).

The defendant did not, at the same time, return the plaintiff's post-dated cheque to the plaintiff.

In so far as the plaintiff is concerned, he had complied with the term of the sale and purchase agreement since by cl. 4 of the said agreement, one of the modes for payment is by a cheque.

Clause 4 of the agreement reads as follows:

> The balance purchase price should be paid at the time and in the manner set out in section 3 of the 2nd Schedule hereto and the receipt of Vendor's solicitors or the Purchaser's solicitors (if the Vendor is unrepresented), of such payment by way of cheques, bankdrafts, or cashier's order, should be deemed to be receipt of payment by the Vendor provided that in the event payment is made by **cheque,** the Purchaser should be liable to pay whatever bank commission incurred in the clearance of the said cheque **and** the **day of clearance** of the said cheque shall be considered the **date of settlement** of the balance purchase price of the said property.

Following this, the plaintiff's solicitor wrote to the defendant's solicitor on 29 November 1997, requesting the defendant to send them the relevant documents, since the plaintiff had duly complied with the terms of the agreement. The plaintiff further gave notice that if the defendant failed to comply with its request, the defendant would be in breach of the sale and purchase agreement and would have to face legal action. (exh. P6, encl. 33).

Nothing further ensued between the parties, until 1 December 1997 when the plaintiff's solicitor wrote to the defendant to place on record that its letter of 29 November 1997 to the defendant was refused acceptance. (exh. P7, encl. 33).

It later transpired in defendant's affidavit (para. 13 of encl. 35), that the defendant's solicitor did not or could not accept service of the plaintiff's letter on 29 November 1997, since the defendant solicitor's legal firm was closed on that day (Saturday).

This fact, combined with the defendant's earlier response in refusing to accept the plaintiff's post-dated cheque of 29 November 1997 is surely indicative of **one** thing and one thing only, *ie*, the defendant's disinclination to accept the plaintiff's post-dated cheque and putting forth all manner of excuses is simply because the defendant's solicitor's legal firm is **not** operating on Saturdays. Thus the pedantic approach taken by the defendant that the post-dated cheque is **unlikely** to be cleared on a Saturday is completely untenable. It is surely irrelevant whether the defendant's solicitor's firm is open on Saturdays or not, since the banks are.

In fact the defendant's averment operates negatively for them, since the case of *Lim Yoh v. Astana Strategi (M) Sdn Bhd & Anor* [1998] 2 CLJ Supp 275; [1998] 3 MLJ comes to mind, where the Court observed that:

> ... The solicitors were **duty bound** to make themselves available at the relevant time to ensure that the contract was completed in accordance with the duty of the plaintiff which they have taken over. The fact that they were closed on that day and were therefore unable to complete the agreement was a matter between them and the plaintiff. *So long as the defendants were ready, willing and able to complete the agreement on that day, they were absolved from any fault.* (The emphasis is mine)

It is obvious that in the present case, the plaintiff was ready willing and able to complete the agreement and therefore should be absolved from blame.

The court in **Lim Yoh's** case above went on further to observe that:

> ... The corollary was that the solicitors appointed by the plaintiff ought to have been available on **Sunday** 19th May 1996 to complete the agreement and the question of extension of the date did not arise. (The emphasis is mine).

The above authority fortifies the argument that it is not open to the defendant to plead that its inability to accept the plaintiff's cheque is because it was dated on a Saturday. Regardless of whether it is a working day or not for the defendant's solicitor's firm, it is duty bound to see the agreement through. A fortiori, when the preconditions have all been met with by the plaintiff.

It is obvious therefore that the defendant is not disposed to carrying out the agreement to its logical conclusion.

This disinclination is manifest in its letter of 27 November 1997, at para. 10 of its statement of defence and at para. 11 of its affidavit affirmed on 3 March 1998, when it states it is not likely that the said cheque can be cashed or cleared on the same day since 29 November 1997 falls on a Saturday.

The defendant in all these three documents expressed the belief that:

> ... cek tersebut adalah cek berpalang bertarikh 29 November 1997 yang jatuh pada hari Sabtu, dan **tidak mungkin** dapat ditunaikan pada atau sebelum 30 November 1997 ... (The emphasis is mine). [See para. 15, encl. 35].

The defendant's stance as seen above is cause for concern since it is inconceivable that the defendant's solicitor could be so untutored in the ways of commercial and business efficacy of the day.

It is commonplace for cheques to be presented to the bank and "marked" to ensure that they be cleared on the stated day. This is normal banking practice for commercial expedience and this can be done even if the cheque is from another local bank (which is the position in the instant case).

This means that the defendant who received the plaintiff's cheque on 27 November 1997 had three clear days, *ie*, on Thursday, Friday and Saturday with which to make the necessary banking arrangement.

However, there is nothing in evidence to show that the defendant had made any attempt to present the cheque to the bank or arrange to have it marked so that payment is assured on 29 November 1997 which is a working day and in any event, is one day **before** the completion date (*ie*, 30 November 1997).

It is observed that the defendant's response seems all along to be replete with conduct not inconsistent with that of *mala fides* and it is apparent that the defendant's dogged refusal to bank in the plaintiff's cheque is simply because the defendant's solicitor's firm closes on Saturdays and not because the bank is unable to clear the cheque in question.

The climax to this wilfulness comes about when the defendant, ignoring cl. 11(b) of the sale and purchase agreement which calls for giving 14 days notice in writing to the purchaser to remedy the breach (assuming of course the defendant is legally right), terminated the agreement.

The defendant gave the plaintiff a letter to this effect dated 1 December 1997 (exh. LSF2, encl. 12). The defendant gave notice to the plaintiff to forfeit the 10% deposit and undertook to return the redemption sum to the plaintiff (amounting to RM455,183).

It is observed that until today, this redemption sum still remains unpaid. This persists, despite the above undertaking and despite the defendant's solicitor's submission before me that the redemption sum is a non-issue (please see p. 3 of notes of proceedings). So why is the defendant still holding on to the plaintiff's redemption sum? It is also to be observed that until today the plaintiff's cheque dated 29 November 1997 amounting to RM1,101,817 is also retained by the defendant. Why is the defendant clinging on to the plaintiff's cheque if the defendant chose to spurn it?

Undoubtedly, this whole transaction is manifest of defendant's wilful intent, for which the defendant should be given short shrift.

Undoubtedly too, the plaintiff had completed his part of the bargain. He had faithfully complied with the terms of the agreement by paying the 10% deposit, he had paid the stamp duty, he had paid the redemption sum and he had also paid the balance purchase price on or **before** the completion date (30 November 1997).

Thus, is the plaintiff's conduct therefore, the conduct of a person who would renege on his obligation and would he jeopardise the large sums of monies already expended by him? Surely not.

The defendant, in her valiant effort to salvage her case, affirmed an affidavit on 22 December 1998 at para. 8, that the letter of her solicitor dated 27 November 1997 which demands a **cheque** from the plaintiff (exh. P5, encl. 33) is a typing error in that the word "cheque" should have read "cashier's cheque" or "cashier's order".

I find this unacceptable not only because it is a pathetic excuse, it is also untenable and unacceptable for the defendant to affirm to a fact which is not in her personal knowledge since she was not the maker of the said letter, thus violating O. 41 r. 5(1) of the Rules of the High Court 1980.

The Law

The agreement, in particular cl. 4 and the 2nd schedule need to be read together. The 2nd schedule fixed the balance of the 90% of the purchase price to be paid on 30 November 1997, and this date is the completion date of the agreement.

The plaintiff sent the cheque dated 29 November 1997 on 27 November 1997 by hand to the defendant. The defendant had three clear days in which to make arrangement by presenting the cheque or for marking the same. Had the defendant done so, the payment of the balance would have been completed on 29 November 1997, well before the 30 November 1997. Even if the

cheque cannot be cleared on the 29 November 1997, but was cleared a day or two later, say on the 2nd or 3rd of December 1997, the worst that could have happened is that the plaintiff is liable to pay for whatever bank commission is incurred in the clearance of the said cheque and the day of clearance of the said cheque shall be considered the date of settlement of the balance purchase price of the said property (see cl. 4 of the agreement).

However, to all intents and purposes, the **date of completion** will always be and remain to be **30 November 1997** as per the 2nd Schedule. This remains constant, the variable being the settlement date when the cheque is cleared.

At the risk of being hackneyed, the plaintiff had paid the balance purchase price **before** the completion date (30 November 1997), thus he had not breached the agreement.

Whether the cheque is cleared earlier or later than 30 November 1997 is therefore not the deciding factor as regards the completion date of the agreement, since the completion date is **not** synonymous with the date of settlement.

It would seem therefore, that by so terminating the agreement, the defendant is either unacquainted with the terms of the agreement at best, or had acted with wilful impunity at worst. Either way, the defendant is precluded from defending an otherwise straightforward matter, which means therefore that this is an appropriate matter to be summarily determined, as quite obviously there is nothing in evidence which should merit further investigation at trial.

Thus, with the full backing of the battalion of authorities on this subject, I find that the defendant has failed to scuttle the plaintiff's case in that the defendant has failed to raise any triable issue that could preclude the plaintiff from obtaining his summary judgment. I therefore dismiss the defendant's appeal with costs.

However, before granting the order my final observation is this:

> It is noted that the defendant as vendor had defaulted in the agreement. Thus, cl. 12.2 of the agreement can be invoked. In that connection, had the vendor following the default, complied with cl. 12.2(a) of the agreement, then no interest would have been payable by the vendor to the purchaser. However, it is in evidence that the defendant had not complied and does not seem to wish to comply with cl. 12. 2(a) thereof.
>
> As was in evidence and alluded to earlier in this judgment, the defendant had undertaken to reimburse the redemption sum *vide* the defendant's solicitor's letter of 1 December 1997. This undertaking was repeated in the

defendant's submission on 15 April 1998 (see notes of proceedings) where it was articulated by defendant's counsel that the redemption sum is a non-issue and therefore would be paid forthwith.

Needless to say, that undertaking remains unfulfilled (at least, at the time of writing this grounds of judgment).

Thus, taking all these facts into consideration I make the following order:

(a) The defendant's appeal against the O. 14 order is dismissed with costs;

(b) The sum of RM173,000 being the 10% deposit be returned to the plaintiff with interest at 10% p.a. from the date of payment, *ie*, 11 July 1997 to 1 March 1999;

(c) The sum of RM455,183 being the redemption sum be returned to the plaintiff with interest at 10% p.a. from the date of payment, *ie*, from 14 November 1997 to 1 March 1999;

(d) The sum of RM173,000 being liquidated damages be paid to the plaintiff.

(e) All payments as embodied in (a), (b), (c) and (d) above shall carry interest at 8% pa from 2 March 1999 till full realisation.

The 2nd Order - Order For Stay

Shortly after having pronounced the order above, the defendant's solicitor immediately made an oral application to the court for a stay of execution pending appeal to the Court of Appeal on the ground that this is a matter of grave urgency, since in the absence of a stay, the defendant's property lies in danger of being auctioned.

This court, conscious of the hazards of allowing an oral application without more, and in the absence of any material before the court, in the form of affidavits or any other evidence, save only on the law, was hard put to allow such an oral application.

I cautioned the defendant's counsel as such, and even went so far as to have the case stood down for a couple of hours, in the hope that in the intervening period counsel would be persuaded to change his mind thus giving him time to put in a formal application at a later date.

However, the defendant's counsel persisted, and intimated to this court that the matter of stay was a great urgency to his client.

Having cautioned counsel of the consequences of an oral application, this court adjourned the matter to 2.30pm.

Promptly at 2.30pm, the defendant's solicitor appeared with the plaintiff's solicitor and proceeded to submit that he does not wish to reconsider his oral application and this court was persuaded to hear him on his oral application.

It is of course axiomatic that in an application for a stay of execution the court has an absolute and unfettered discretion to grant or refuse an application for stay. As a rule the court will only grant stay if there are special circumstances and which circumstances must be deposed in the affidavit supporting the application (see *Syarikat Berpakat v. Lim Kai Kok* [1983] MLJ 406).

It is also trite that an appeal does not operate automatically as a stay of execution. This is borne out by s. 73 of the Courts of Judicature Act 1964 and r. 13 of the Rules of the Court of Appeal 1994.

The defendant's solicitor began his submission by launching into the difficulties faced by the defendant on account of the private caveat lodged by the plaintiff, indicating that the defendant took exception to the existence of the private caveat, because it subverts any attempt on the defendant's part to dispose off the said property.

This argument alone, is open for scrutiny. Firstly, the private caveat argument is an untenable argument for the special circumstances principle, since to my mind, the existence of a private caveat does not come within the sphere of "special circumstances".

Admittedly, the "special circumstance" test itself is difficult to define. One of the "off-shoots" of this test is the nugatory test, advocated in *See Teow Guan & Others v. Kian Joo Holdings Sdn Bhd* [1997] 2 CLJ 299; [1997] 3 AMR.

But my view is that a private caveat on the said property is a separate and distinct matter, which has no bearing whatsoever on the matter before this court, as to justify a stay. In any case, the plaintiff has every right to lodge a private caveat as evidenced in cl. 2 of the agreement, to protect his interest. I indicated this to the defendant's counsel as much, and said that a separate application to set aside the caveat would have to be made by the defendant, but the fact remains that this does not constitute "special circumstances".

Having said that, the defendant's solicitor changed tack and submitted that, in fact, he need not show special circumstances, and cited the case of *See Teow Guan* as authority for this proposition.

It must not be lost sight of that *See Teow Guan* proposes the nugatory approach in lieu of special circumstances, and secondly, the defendant's application is under O. 47 r. 1(a) of the Rules of the High Court 1980, where

it is expressed in clear terms the exigency of the special circumstances "which render it inexpedient to enforce the judgment or order ... ".

The defendant's solicitor submitted further that there is merit in his appeal. The defendant's solicitor's contention is a bare assertion, without more, and is therefore insufficient to support the application for stay. In any event, strong grounds or merits for the appeal is not sufficient reason to grant the application (see *Atkins v. The Great Western Railway Company* [11 LR 400].

The plaintiff's solicitor rightly observed and submitted accordingly that there is no formal application for stay, supported by an affidavit citing special circumstances to justify the making of an order. The plaintiff went on to state that the onus is therefore on the defendant to demonstrate special circumstances for the application.

I would readily agree with this submission and said so, to both parties, since I found it to be a more compelling argument than any other argument thus far submitted by counsel.

In reply, the defendant's solicitor had the temerity to suggest that since the court had allowed his oral application, there is therefore no reason why the court should now expect material before it, in the form of affidavits to support the application.

I need to stress this here and now. The defendant's solicitor should be severely taken to task for having now turned the table, so to speak, and cast blame on this court for allowing him to go on merrily with his oral application and then afterwards shunning his application on the ground that there is no supporting affidavit, when it is evident that it was at counsel's behest that the court heard him, despite this court's caution to counsel, on the dangers of an oral application. The defendant's counsel's uncivil response veers dangerously on contempt, and frankly, this court was close to citing him for it. However, this court is mindful always for the need to be extremely circumspect in such matters and it is greatly hoped that there is reciprocity from the bar.

Thus, after having heard parties and after having regard to the facts and circumstances of this case, it is important to bear for depriving the successful party of the fruits of its judgment at first instance.

In this case, it is obvious that there is no material before this court which shows some special circumstances taking the case out of the ordinary.

The special circumstances principle was restated by Raja Azlan J in *Leong Poh Swee v. Ng Kat Chong* [1966] 1 MLJ 1986 in the following terms:

> Although this Court has an unqualified discretion to grant a stay it has never been the practice to do so unless it is supported by an affidavit of special circumstances.

The requisite for an affidavit of special circumstances found expression in the case of *Syarikat Berpakat v. Lim Kai Pok* [1983] 1 MLJ 406, where His Lordship Hashim Yeop Sani, J., observed that;

> As a rule, the Court will however only grant stay if there are special circumstances and which circumstances must be deposed in the affidavit supporting the application.

The requisite for special circumstances is fortified in the Federal Court case of *Kerajaan Malaysia v. Dato' A Ghani Gilong* [1995] 3 CLJ 169 where His Lordship Edgar Joseph Jr, FCJ, observed that:

> ... there was no formal application for stay supported by an affidavit affirmed by the taxpayer ... alleging special circumstances to justify the making of the order for stay. In other words there was no material upon which the Judge could have granted the order for stay.

Since judicial thinking on the subject is consistent, this must be taken into consideration and viewed against the prejudice that might visit the plaintiff should the stay be granted.

The plaintiff had, by affidavit evidence, deposed to his financial standing and it is obvious that he has established himself as a man of means. This is not challeged by the defendant.

It is easily countenanced that the position in the instant case is volatile.

The defendant has clearly demonstrated a defensive, difficult and decidedly mulish stance on the problem at hand, by among others, not returning the plaintiff's cheque, and by completely ignoring the plaintiff''s cheque, and by completely ignoring the plaintiff's rights to the redemption sum (at least), which the defendant himself at the outset had conceded was a non-issue. The said redemption sum should not be an item for the stay. If the redemption sum is non-contentious, why is there a dogged refusal to pay?

This court has to consider several factors before making an order for a stay or otherwise, not least of which, is the question of where the balance of convenience lies.

It is reiterated that the application for a stay is by no means granted at the drop of a hat. Thus, I have taken into account:

(a) The fact that the defendant had gone on an oral application without any supporting affidavit, thus depriving the court of any material upon which it could exercise its discretion judiciously;

(b) The fact that the defendant had obviously no arguable case, hence the grant of the O. 14 application;

(c) the fact that the defendant had shown careless disregard to its own undertaking to reimburse the redemption sums due to the plaintiff;

(d) The fact that even if the defendant has merit in the appeal, this amounts to a monetary judgment, which the plaintiff had amply demonstrated his ability to comply.

Thus in all these circumstances, to my mind, it would be unjust and inequitable upon the plaintiff to have judgment stayed until final disposal of the appeal by the defendant, since this court has to balance the financial repercussions which would be suffered by the plaintiff, with the detriment which would accompany the defendant's application when it is finally disposed of the Court of Appeal.

Thus for the reasons recounted above, there is only one way to go and that is to dismiss the defendant's application for stay, with costs.